STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

GINO ROBERT REA,

Defendant-Appellee.
_____/

Supreme Court
No.

Court of Appeals
No. 324728

Circuit Court
No. 14-250517 FH

PLAINTIFF'S APPLICATION FOR LEAVE TO APEPAL

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JURISDICTIONAL STATEMENT AND STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

The Michigan Court of Appeals, in a divided published opinion dated April 19, 2016, affirmed the order from former Oakland Circuit Court Judge Colleen A. O'Brien, dismissing the charge of operating while intoxicated, third offense notice. MCL 257.625(1) & (9)(c). *People v Rea,* ___Mich App ___; ___NW2d___ (Docket No. 324728, dec'd April 19, 2016)(Gleicher, P.J., Shapiro, J., and Jansen, J., dissenting)(Appendix A). The People are filing this application for leave to appeal from that April 19, 2016 opinion. This Court has jurisdiction of this appeal pursuant to MCR 7.303(B)(1).

The People seek peremptory reversal or a grant of leave to appeal because the majority decision from the Michigan Court of Appeals is clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a). When stopped by the police, defendant was "operating"[1] his vehicle while intoxicated on the upper portion of his paved driveway which connected his detached garage to the public roadway. The Michigan Legislature amended the operating while intoxicated statute in 1992,[2] broadening the areas where individuals are prohibited from operating a vehicle while intoxicated, to include areas that are "generally accessible to motor vehicles." There is no statutory requirement that areas "generally accessible to motor vehicles" must also be open to public access. Because defendant's driveway had no physical restrictions preventing ingress or egress, it was generally accessible to motor vehicles pursuant to the plain language of MCL 257.625(1). Therefore, defendant can be charged and convicted of operating

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[1] There is no dispute in this case that defendant was "operating" his vehicle because he was backing his vehicle down his driveway when he was stopped by the police.

[2] MCL 257.625. See 1991 PA 98, effective January 1, 1992.

His vehicle while intoxicated, even if the operation of his vehicle was in his own private driveway.

The People respectfully request that this Honorable Court peremptorily reverse the opinion of the Michigan Court of Appeals, vacate the Oakland County Circuit Court order of dismissal, and remand to the circuit court for further proceedings. In the alternative, the People ask this Court to grant this Application for Leave to Appeal.

INDEX TO AUTHORITIES CITED

CASES

STATUTES

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RULES

STATEMENT OF QUESTION PRESENTED

I. BECAUSE DEFENDANT WAS DRIVING HIS VEHICLE ON HIS UNSECURED PRIVATE DRIVEWAY WHICH CONNECTS HIS DETACHED RESIDENTIAL GARAGE TO THE PUBLIC ROADWAY, DID HIS CONDUCT FALL WITHIN THE SCOPE OF THE OPERATING A VEHICLE WHILE INTOXICATED STATUTE, MCL 257.625(1), WHICH PROHIBITS OPERATING IN AN AREA "GENERALLY ACCESSIBLE TO MOTOR VEHICLES?"

Defendant will contend the answer should be, "No."

The People contend the answer is, "Yes."

The Court of Appeals answered this question, "No."

The Circuit Court answered this question, "No."

STATEMENT OF FACTS

Defendant was charged with operating while intoxicated [OWI], third offense notice. MCL 257.625(1) & (9)(c).[3] Defendant was bound over to the Oakland County Circuit Court following a preliminary examination before 35th District Court Judge James Plakas. During the preliminary examination, the parties stipulated to the result of defendant's Michigan State Police [MSP] blood test, which was .242 grams alcohol per 100 milliliters blood. [May 9, 2014 Preliminary Examination Transcript [PE I], 4-5]. Northville Police Officer Ken DeLano testified that on March 31, 2014, at approximately 1:40 a.m., he was dispatched for a noise disturbance to 43767 Park Grove Court, in the City of Northville, in Oakland County. (PE I, 6-7). DeLano arrived a couple of minutes after Officer [David] Randall. (PE I, 7). When DeLano arrived at the location, he observed Officer Randall speaking to defendant. (PE I, 7). Defendant was sitting in the driver's seat of his vehicle which was parked in his driveway. (PE I, 7). Randall told defendant to turn the music down in the vehicle and to head inside for the night. (PE I, 8). Randall and DeLano left the scene. (PE I, 8). Five minutes later DeLano received a second dispatch to defendant's residence; it was reported that defendant was playing loud music, honking his car horn, and revving his engine. (PE I, 8). When DeLano and Randall arrived at the scene the second time, the vehicle was not in the driveway, but there were lights on inside of the house. (PE I, 8). DeLano did not hear any loud noises. DeLano talked to defendant's neighbor who had called in the complaint, calmed him down, and left for a second time. (PE I, 9). DeLano

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[3] After he was bound over to the Oakland County Circuit Court, a notice of intent to seek sentence enhancement fourth or subsequent offense was filed. (Appendix B). The habitual offender notice listed three prior felony OWI convictions, which were in addition to the two prior misdemeanor OWI/impaired convictions set forth in the information for the charged offense.

parked down the street because he was concerned there might be a third dispatch about loud music. (PE I, 9).

DeLano was dispatched to defendant's house a third time, and when he arrived, defendant's car was not in the driveway and the garage door was shut. However, the windows of the house were open and there was loud music coming from inside the house. (PE I, 9). DeLano parked his patrol vehicle in front of defendant's drive, and as he was walking up defendant's driveway, he noticed the garage open and a Cadillac being backed up towards his direction. (PE I, 9). DeLano shined his flashlight to alert the driver that there was someone behind him. (PE I, 9). Defendant had travelled about 25 feet in his vehicle when DeLano made contact with him. (PE I, 9). The vehicle was stopped in defendant's driveway, next to his house. (PE I, 11). When DeLano made contact with defendant, he immediately detected a strong odor of an intoxicating substance emanating from the inside of vehicle. (PE I, 10). DeLano said that defendant's eyes were glossy and blood shot, and he was slurring his speech. (PE I, 10-11). Defendant suddenly put his vehicle in drive and pulled forward into the garage. Defendant bumped the front of his vehicle into some of his belonging stored in the garage causing them to fall to the ground. (PE I, 11).

After defendant's car hit the items in the garage, he exited the vehicle and started to walk towards DeLano. (PE I, 11). Defendant was swaying as he walked and appeared to be intoxicated. (PE I, 12). DeLano asked defendant to move towards his patrol vehicle, and then DeLano attempted to administer standard field sobriety tests. (PE I, 11). DeLano said that

defendant was uncooperative and was not willing to perform any of the tests. (PE I, 12). Defendant began getting argumentative, took off his coat and laid it on the snow. (PE I, 12). Defendant began swearing, and he was eventually placed under arrest for operating while intoxicated. (PE I, 12). Defendant refused to consent to a breath test at the police station. (PE I, 13). DeLano drafted a search warrant and it was signed and executed. (PE I, 13). Defendant was taken to St. Mary's Hospital, and a registered nurse drew two vials of his blood. (PE I, 13). The vials were sealed inside a MSP blood kit and handed back to DeLano. (PE I, 13). The vials of blood were mailed to the MSP. (PE I, 13).

On cross-examination, DeLano testified that defendant could not have exited his driveway even if he wanted to because DeLano's car was blocking the driveway. (PE I, 21). DeLano saw defendant back his car down his driveway and was nervous that defendant would hit his vehicle, so he shined a flashlight so defendant would stop his car. (PE I, 22). DeLano said that when defendant stopped, he was 25 feet from the neighbor's residence and approximately 50 feet from the road. (PE I, 25). Defendant's yard was not fenced in, but there was a fence along one side of the property. (PE I, 25). DeLano said defendant did not have a sign posted that his property was private, and he did not have a fence or gate in the front of his driveway. (PE I, 26). Photographs of defendant's driveway were admitted into evidence. (PE I, 27). Defendant had a two-car detached garage and a fence to the right. (PE I, 27). DeLano said that on the night in question, defendant's vehicle was further down the driveway [closer to the sidewalk] than the vehicle appeared in the picture. (PE I, 28).

Defense counsel objected to the prosecutor's bindover request, asserting that defendant was not operating his vehicle on a road that the public had access to. (PE I, 31). The prosecutor responded that a private driveway is "generally accessible" to motor vehicles. (PE I, 33-34). The

district court concluded that unless a driveway has a gate across, it would be generally accessible to motor vehicles. (May 30, 2014 Preliminary Examination Transcript [PE II], 15). The court found probable cause and bound the matter over to the circuit court. (PE II, 16).

In circuit court, defendant filed a motion to quash, and two motions to suppress based on an illegal arrest and an illegal entry. Defendant alleged in his motion to quash that the evidence at the preliminary examination did not establish that he operated a motor vehicle while intoxicated in a place generally accessible to motor vehicles. An evidentiary hearing was held before former Oakland County Circuit Court Judge Colleen O'Brien. During the evidentiary hearing, Officer DeLano again testified that he was dispatched to defendant's residence three times on the night in question for noise complaints. (October 17, 2014 Evidentiary Hearing[4] Transcript [ET], 10-17). The first time DeLano was dispatched, defendant's Cadillac was in the driveway next to his house. (ET, 12). Defendant was in his car and Officer Randall told defendant to turn down his music. (ET, 12). Defendant was upset that the police had been called. (ET, 14-15). Defendant was swearing; he did not think it was a problem that he was playing his music. (ET, 15). DeLano and Randall eventually left the scene without incident. (ET, 15).

A few minutes later, DeLano was dispatched a second time to defendant's residence. (ET, 15). DeLano spoke to defendant's neighbor, Mr. Gabiniewicz, who was very upset. (ET, 16). Gabiniewicz lived next-door [on the right side as viewed from the street] to defendant. (ET, 11). Gabiniewicz said that defendant was revving his engine, honking his horn, and playing loud music. (ET, 15). However, defendant was not around when DeLano arrived at the scene and no

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[4] The court reporter erroneously titled this transcript as the "Preliminary Examination."

music was playing. (ET, 16). DeLano could not recall whether defendant's car was in the driveway or in the garage. (ET, 16).

Upon receiving a third dispatch, DeLano arrived back at defendant's house and parked in the street. (ET, 17). DeLano was standing in defendant's driveway when defendant's garage door opened and defendant backed his vehicle out of the garage towards DeLano's location. (ET, 17). DeLano said that defendant backed his car out into the driveway about 25 feet, and DeLano shined his flashlight to indicate to defendant that he was behind him. (ET, 17-18). At that point defendant stopped the vehicle. (ET, 18). When the car stopped, the back bumper of the car was "pretty close to the front of the house." (ET, 18). DeLano then made contact with defendant, and DeLano noticed that defendant's eyes were bloodshot and glossy, he was slurring his words, and he had a very strong odor of intoxicants. (ET, 19). DeLano said that it appeared that defendant was "pretty highly intoxicated." (ET, 19). Defendant pulled the car back into the garage and his front bumper hit the back of the garage. (ET, 20). Defendant exited from the car and walked towards DeLano. (ET, 20). Defendant was unsteady on his feet and was swaying. (ET, 20). Defendant was asked to perform field sobriety tests but refused to do so. (ET, 21). Defendant became very upset and said he was going to beat up the officers because they were on his property. (ET, 21). After defendant refused to perform the field sobriety tests, he was placed under arrest. (ET, 21).

During cross-examination, a survey of defendant's property was admitted into evidence. (ET, 22). DeLano said that defendant did not have a fence around the front of his property, but there was a fence to the right of his property. (ET, 25). DeLano admitted that he did not have a warrant for defendant's arrest or to search his property. (ET, 25). When defendant backed his car out of his garage, he did not cross over the point where the fence line and the house started. (ET,

26). DeLano said that it appeared from the photographs admitted by defendant that the fence line did not extend to where the house started. (ET, 28-29).

On redirect, DeLano said that the first time he encountered defendant, defendant's vehicle was further down the driveway, closer to the cul-de-sac. (ET, 31). The third time DeLano encountered defendant, defendant's vehicle pulled out and stopped somewhere between where the fence line began and where the front of the house began. (ET, 32). DeLano said that defendant drove his vehicle out of the left side of the garage. (ET, 32).

The trial court issued a written opinion, finding that defendant's driveway, which was "encompassed within Defendant's backyard/sideyard" did not constitute an area "generally accessible to motor vehicles." (Appendix C, p 4). For that reason, the court dismissed the case.

The People filed a claim of appeal to the Michigan Court of Appeals. In a divided published opinion dated April 19, 2016, the Michigan Court of Appeals affirmed the circuit court order dismissing the charge of operating while intoxicated, third offense notice. MCL 257.625(1) & (9)(c). *Rea,* ___Mich App at ___, sl op, at p 4. The majority opinion recognized that defendant backed his car from his garage to a point in his driveway in line with his house and found that "[t]he 'general public' is not 'widely' or 'popularly' or 'generally' permitted to 'access' that portion of a private driveway immediately next to a private residence." *Id.,* sl op, at pp 3-4. The Court found that the part of the driveway where defendant drove his car was not "a 'place' …generally accessible to motor vehicles." *Id.,* sl op, p 4. In a footnote, the court noted that "had a member of the public trespassed upon defendant's rights and driven while intoxicated in this area, a different result might be required." *Id.* sl op, p 4, n 3. The dissenting opinion found that it was the role of the trier of fact to determine whether defendant's driveway was generally accessible to motor vehicles. *Id.* sl op, p 1 (Jansen, J. dissenting).

ARGUMENT

I. AS A MATTER OF LAW, AN UNSECURED PRIVATE DRIVEWAY CONNECTING A DETACHED RESIDENTIAL GARAGE TO THE PUBLIC ROADWAY IS AN AREA "GENERALLY ACCESSIBLE TO MOTOR VEHICLES;" THEREFORE, THE MICHIGAN COURT OF APPEALS WAS CLEARLY ERRONEOUS IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE CHARGE OF OPERATING A VEHICLE WHILE INTOXICATED, THIRD OFFENSE NOTICE, MCL 257.625(1) & (9)(c), WHEN DEFENDANT'S CONDUCT FELL WITHIN THE SCOPE OF THE STATUTE.

STANDARD OF REVIEW & PRESERVATION OF ISSUE:

In considering a trial court's ruling on a motion to suppress, this Court reviews its factual findings for clear error and its interpretation of the law de novo. *People v Dunbar,* ___Mich___; ___NW2d___ (Docket No. 150371, dec'd March 29, 2016), sl op, p 5, citing *People v Tanner,* 496 Mich 199, 206; 853 NW2d 653 (2014). Issues of statutory construction are reviewed *de novo. People v Yamat,* 475 Mich 49, 52; 714 NW2d 335 (2006). Whether conduct falls within the scope of a penal statute, is a question of statutory interpretation that is reviewed de novo. *People v Hill,* 486 Mich 658, 665-666; 786 NW2d 601 (2010).Whether a private driveway is "generally accessible to motor vehicles," as defined by the Michigan Legislature, is a question of law subject to de novo review.

This issue was preserved when the prosecutor objected to defendant's motion to quash.

ANALYSIS:

The majority opinion from the Michigan Court of Appeals found as a matter of law that defendant was ***not*** operating his vehicle while intoxicated in an area "generally accessible to motor vehicles" because he was driving his vehicle from his garage to a point in his private driveway in line with his house when he was stopped by the police.[5] The People submit that the

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[5] *Rea,* ___Mich App at ___, sl op, pp 3-4.

majority opinion from the Michigan Court of Appeals is clearly erroneous and will result in a miscarriage of justice because defendant's actions fell within the plain language of MCL 257.625(1). As a matter of law, an unsecured residential driveway connecting a detached garage to a public roadway is an area "generally accessible to motor vehicles."

The Motor Vehicle Code refers to operation of vehicles ***on highways***, except as otherwise provided. MCL 257.601. Specifically, the statute provides:

> **257.601. Applicability of chapter to operations on highways, exceptions.**
>
> Sec. 601. The provisions of this chapter[6] relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways ***except where a different place is specifically referred to in a given section***. [emphasis added].

Michigan's operating while intoxicated statute refers to other areas, besides highways, where it is illegal for persons to operate a vehicle while intoxicated, specifically:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public ***or generally accessible to motor vehicles***, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. [MCL 257.625, emphasis added].

MCL 257.625 was amended in 1992 to include the language "generally accessible to motor vehicles." See 1991 PA 98, effective January 1, 1992. The ***reach*** of the prohibition for operating a vehicle while intoxicated was "***extended*** [by 1991 PA 98] to apply anywhere 'generally accessible to motor vehicles.'" House Legislative Analysis, HB 4827 et al, June 12, 1991 (emphasis added). (Appendix D, p 1).

Prior to the amendment, MCL 257.625 provided as follows:

> (1) A person, whether licensed or not, who is under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, shall not operate a vehicle upon a highway or other place

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[6] Chapter VI. Obedience to and Effect of Traffic Laws.

> open to the general public, including an area designated for the parking of vehicles, within this state. [*People v Hawkins*, 181 Mich App 393, 396; 448 NW2d 858 (1989)].[7]

The upper portion of defendant's driveway may not have been an area ***"open to the general public,"*** but it is an area "***generally accessible to motor vehicles.***" The Michigan Court of Appeals has made clear that areas "generally accessible to motor vehicles" do not have to be open to the general public. In *People v Nickerson*, 227 Mich App 434, 440; 575 NW2d 804 (1998),[8] the Court specifically recognized that the Legislature intended to broaden the coverage of the operating while under the influence statute when it was amended to prohibit drunk driving in places "generally accessible to motor vehicles." The Court held that the circuit court had erred in interpreting the statute to require that the driving occurred in a place "generally accessible ***to the public***." *Id.*, emphasis added. The Court noted that the statutory language is clear that "open to the general public" and "generally accessible to motor vehicles" are "two distinct alternative places other than highways where driving a vehicle while under the influence of liquor is prohibited." *Id.* The Court recognized that even if the location was not open to the general

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[7] Under this earlier version of the statute, the Michigan Court of Appeals noted:

> A literal reading of this statute indicates that drunk driving on any place or parking lot which is merely open to the general public is prohibited, as opposed to any area that is obviously closed to the public. ***The language of the statute focuses upon the accessibility of the area to the public***. Therefore, absent barriers to public access, a shopping center parking lot would be open to the public. [*Hawkins,* 181 Mich App at 396-397].

See also *City of Holland v Dreyer*, 184 Mich App 237, 238-239; 457 NW2d 56 (1989)(private mobile home park was "open to the general public"); *People v Tracy*, 18 Mich App 529, 532-533; 171 NW2d 562 (1969) (lawn of dormitory at Wayne State University was "open to the general public").

[8] The opinion was signed by both Justice Young and Justice Markman when they were judges of the Michigan Court of Appeals.

public, the statute would be violated if the location was generally accessible to motor vehicles. *Id.*[9] The court found that the pit area of a speedway was in fact "generally accessible to motor vehicles" even though there were age and waiver requirements for admission into the pit area. *Id.* at 438, 440. See also *People v Shankle,* 227 Mich App 690, 694; 577 NW2d 471 (1998)("it is commonplace for solicitors, drivers of motor vehicles wanting to reverse directions, and other individuals to enter the unsecured driveways of private homes").

The majority opinion from the Michigan Court of appeals was clearly erroneous because it simply failed to give effect to the plain meaning of the phrase "generally accessible to motor vehicles" pursuant to MCL 257.625(1). Whether a private unsecured driveway falls within the definition of an area that is "generally accessible to motor vehicles" is a question of statutory construction. The rules of statutory construction are well established. *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *McCormick v Carrier,* 487 Mich 180, 191; 795 NW2d 517 (2010); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first step in that determination is to review the language of the statute itself. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). However, if a statute is clear and unambiguous, judicial construction or interpretation is

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[9] Although some out of state cases have held that it is not illegal to operate a vehicle while intoxicated in a private driveway, those jurisdictions also require that for the operation to be unlawful, the operation must be in an area open to the public or open to public access. See *State v McCave,* 282 Neb 500, 514-515; 805 NW2d 290 (2011)(residential driveway is not "open to public access," so it would not be unlawful for a person to be intoxicated in a vehicle in a private driveway); *State v Knott,* 132 Idaho 476, 480; 974 P2d 1105 (1999)(residential driveway is not "private property open to the public"). But see *Woehlhoff v State,* 531 NW2d 566, 567 (ND, 1995)("[s]urely, the public can access any open residential driveway").

unnecessary and precluded. *Dunbar,* ___Mich at ___, sl op, pp 5-6; *People v Stevens*, 460 Mich 626, 643; 597 NW2d 53 (1999).

Words of a statute must be given their plain and ordinary meaning, and only where the statutory language is ambiguous may courts look outside the statute to ascertain the Legislature's intent. *People v Morey,* 461 Mich 325, 329-330; 603 NW2d 250 (1999), citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). "When reviewing a statute, all non-technical 'words and phrases shall be construed and understood according to the common and approved usage of the language,' MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal." *McCormick,* 487 Mich at 192, citations omitted. *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999).

Because the Legislature did not specifically define the terms "generally" or "accessible," "it is appropriate to consider dictionary definitions to discern the meanings of these terms." *Hill,* 486 Mich at 668, citation omitted. When there is a variety of potential definitions, this Court should "determine from among those definitions which the Legislature most reasonably intended by the specific context in which the term is found." *Id.* at 668.

The word "generally" means "usually; ordinary" or "with respect to the larger part; for the most part: *a generally favorable outlook.*" Random House Webster's College Dictionary (1997), p 540.[10] The word "accessible" means "easy to approach, reach, enter, speak with, or

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[10] See also *Merriam-Webster's Learner's Dictionary* <http://merriam-webster.com> (accessed June 6, 2016)(The word "generally" means: "in a general manner: as *a*: in disregard of specific instances and with regard to an overall picture <*generally speaking*> *b*: as a rule: usually").

use" or "able to be used, entered, or reached." *Id.*, p 8.[11] Applying the definitions which the Legislature most reasonably intended by the specific context in which the term is found,[12] it is clear the area where defendant was operating his vehicle [his driveway] was "usually, ordinarily, or for the most part" [generally] "able to be used, entered or reached" [accessible] by motor vehicles."[13]

Assuming *arguendo* that the majority opinion from the Court of Appeals was correct when it found that "[t]he '***general public***' is not 'widely' or 'popularly' or 'generally' permitted to 'access' that portion of defendant's driveway immediately next to a private residence,"[14] that finding is simply irrelevant to the question that needs to be answered here. The question is not whether the "general public"[15] is generally permitted access to that portion of defendant's driveway, but whether "motor vehicles" are. Therefore, even taking into consideration the definitions set forth in the Court of Appeals' majority opinion, the proper question to be answered is whether ***motor vehicles*** are "widely" or "popularly" [generally] permitted access to that portion of defendant's driveway, not whether the "general public" can do so.

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11 See also *Merriam-Webster's Learner's Dictionary* <http://merriam-webster.com> (accessed June 6, 2016)(the word "accessible" means "providing access,' or "capable of being reached" or "open" or "available").

12 *Hill,* 486 Mich at 668.

13 Although the majority opinion may have been correct when it found that the adverb "generally" modifies the adjective "accessible," which modifies the noun phrase "other place," *Rea,* ___Mich App at ___, sl op, p 3, it simply failed to consider the effect of the prepositional phrase "to motor vehicles."

14 *Rea,* ___Mich App at ___, sl op, pp 3-4.

15 Before the statute was amended and broadened to include areas "generally accessible to motor vehicles," the language of the statute focused "***upon the accessibility of the area to the public***." *Hawkins,* 181 Mich App at 396. The language added to the statute in 1992 does not focus on the accessibility of the area ***to the public***, but the accessibility of the area ***to motor vehicles***.

As a matter of law, an unsecured driveway connecting a residential garage to a public street is an area "generally accessible to motor vehicles." Defendant at all times could access the upper portion of his driveway with his motor vehicle. That fact alone is sufficient to satisfy the "generally accessible to motor vehicles" statutory requirement. Additionally [but not necessary to the analysis], defendant's family members, invited guests, and anyone with an "implied license"[16] could legitimately access that portion of defendant's driveway. There is nothing in the record to suggest that the driveway was somehow blocked off to prevent motor vehicles from entering or exiting. Although there was a partial fence along the right side of the driveway, the fence did not prevent anyone from accessing the driveway.

The majority opinion simply failed to recognize that the general public need not have access to the "upper portion" of defendant's driveway. Footnotes two and three reflect the flaw in the majority's reasoning. The judges in the majority opinion noted that their analysis would be different had defendant driven intoxicated in the driveway of an apartment building or other community living center,[17] if defendant's property shared its driveway with the neighboring property, or if defendant proceeded to an area where he could have encountered a member of the general public.[18] The majority also noted that "had a member of the public trespassed upon defendant's rights and driven while intoxicated in this area, a different result might be required."[19] However, the majority opinion simply ignored the plain language of the statute -- the phrase "generally accessible to motor vehicles" does not depend on whether the driveway was

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16 See *Florida v Jardines,* 569 US ___; 133 S Ct 1409, 1415-1416; 185 L Ed 2d 495 (2013).

17 This area would be an area "open to the general public." See *Dreyer*, 184 Mich App at 238-239.

18 *Rea,* sl op, p 4, n 2.

19 *Rea*, sl op, p 4, n 3.

generally accessible to members of the public. That portion of MCL 257.625(1) addresses the accessibility of the area [defendant's driveway] to "***motor* vehicles"** not to the public at large. Even if no member of the public ever drove on the upper portion of defendant's driveway, it was nonetheless, "generally accessible to motor vehicles."

Although agreeing with the prosecution that reversal was warranted, the dissenting judge in the Michigan Court of Appeals found that whether an area is generally accessible to motor vehicles is a question of fact.[20] The dissenting judge noted that it was unclear whether other vehicles were routinely permitted or forbidden to access that portion of the driveway where defendant was operating, and no evidence was presented at the preliminary examination regarding the frequency in which other vehicles could access the driveway.[21] The factual questions raised by the dissent need not be answered in this case because the determination whether a driveway falls within the statute is a legal one that is not for the jury to decide.[22] Juries decide facts, not law. An unsecured driveway connecting a residential garage to a public roadway is generally accessible to motor vehicles ***as a matter of law***.[23]

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20 *Rea,* sl op, p 2 (Jansen, J., dissenting).

21 *Rea,* sl op, p 2 (Jansen, J., dissenting).

22 Defendant's vehicle was stopped by the police as he was backing down his driveway. It is unknown how far defendant's vehicle would have travelled if the police had not arrived to investigate the third noise complaint. Defendant was not charged with attempting to operate a vehicle while intoxicated [MCL 750.92] because the People believed that defendant's conduct fell within the plain language of the statute. However, if this Court agrees with the dissenting opinion that the issue is a question of fact and not a question of law, pursuant to MCL 768.32, the jury may be instructed that defendant was attempting to operate while intoxicated in one of the prohibited areas.

23 Although defendant's driveway was paved, any "driveway," including gravel, dirt, or grass driveways would be "generally accessible to motor vehicles;" the word "driveway" necessarily includes a place for vehicles to drive or park. The Michigan Legislature has defined a "private driveway" as "any piece of privately owned and maintained property ***which is used for vehicular traffic***, but is not open or normally used by the public." MCL 257.44(1). By definition,

....footnote continued on next page

The People agree with the dissent that there may be circumstances where a factual question exists and a jury may be called upon to determine whether the area where a defendant was operating while intoxicated was "generally accessible to motor vehicles," but not in this case. For example, if a defendant is operating a motor vehicle while intoxicated on his own property, in an area that is not a driveway, such as a grassy or dirt area behind his house, a factual question may be raised whether that area is generally accessible to motor vehicles.[24] However, that is not the question before this Court.

Regardless of the fact that most, if not all of the vehicles accessing the upper portion of defendant's driveway may have been his own vehicles, that area was nonetheless "generally accessible to motor vehicles." As this Court has recently recognized, "the potentially broad reach of a statute by itself does not invest a judicial body with the authority either to revise that statute or to interpret it in a manner inconsistent with the language." *Dunbar,* __Mich___, sl op, p 10. Neither the Michigan Court of Appeals nor the circuit court found a constitutional impediment based on the fact that the Michigan Legislature broadened the reach of the OWI statute in 1992,[25]

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private driveways are generally accessible to ***motor vehicles*** because they are "used for vehicular traffic." It is simply irrelevant for purposes of the OWI statute that private driveways are not "open or normally used ***by the public,***" because the "generally accessible" language of MCL 257.625 refers to the general accessibility of "motor vehicles," not the general public.

[24] A jury may be called upon to determine fact questions, such as whether the grassy or dirt area contained evidence of substantial vehicular usage.

[25] Moreover, neither the majority nor the dissenting opinions found that the intrusion onto defendant's private property could not survive constitutional scrutiny under US Const, Am IV and Const 1963, art 1, § 11, because the case was dismissed in the circuit court on statutory, not constitutional grounds. One of the alternative arguments raised by defendant in the circuit court [but not pursued in the Court of Appeals] was that Officer DeLano trespassed onto the curtilage of defendant's home and was therefore required to have a warrant. Defendant's constitutional argument was flawed for a couple of reasons. First, the area where Officer DeLano encountered defendant was not within the curtilage of his home because the driveway was not within an enclosure, it was an open driveway used for ingress and egress of vehicles, defendant took no

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and none can be found especially in light of the fact that some states prohibit operating while intoxicated "anywhere in the state."[26]

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steps to protect the area from observations by passer byers, and the area was clearly visible to anyone walking past the home. *United States v Dunn,* 480 US 294, 301; 107 S Ct 1134; 94 L Ed 2d 326 (1987). Second, even if the upper portion of defendant's driveway was within the curtilage of his home, there was no Fourth Amendment violation. "[W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment." 1 LaFave, Search and Seizure (5th ed), §2.3(f), pp 782-786. See also 2 Wayne R. LaFave, Criminal Procedure, §3(c)(3 ed, 2007)("[in] expectation of privacy terms…it is not objectionable that an officer has come upon the land in the same way that any member of the public could be expected to do, as by taking the normal route of access along a walkway or driveway or onto a porch"). Officer DeLano had a legitimate reason to be on defendant's property due to the noise complaints received from defendant's neighbor. Moreover, DeLano travelled in an area that was a normal route of access, specifically, defendant's paved driveway which connected to a sidewalk leading to the front door. Because DeLano was on defendant's property for a legitimate purpose and because he did not stray from the normal access route to defendant's house, defendant cannot show that his Fourth Amendment rights were violated.

[26] In *Lynch v Commonwealth,* 902 SW2d 813 (Ky, 1995), the Kentucky Supreme Court answered the question whether the prohibition of driving while intoxicated "anywhere in this state" violated the defendant's constitutional right with regard to privacy and the right of a party to do as he pleases on his own property. *Id.* at 815. The Court found no constitutional violation. Specifically, the Court indicated:

> It is generally recognized that a law prohibiting a person from driving a motor vehicle while intoxicated is a remedial statute. Such a statute may be liberally interpreted in favor of the public interest and against the private interest of the driver involved. A plethora of jurisdictions have held it reasonable to construe "elsewhere throughout the state" to encompass all areas of the state, public or private, and forthrightly recognized that the danger posed by the intoxicated driver is not lessened by characterizing the property on which he is driving or in control of a motor vehicle as public or private. An intoxicated person should not be permitted to operate automobiles anywhere because of the potential dangers of such instrumentalities. One in such condition may not remain off the highway; actually he might injure others in other places.
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> Our decision may not be regarded as sanctioning an unwarranted invasion of a person's private property for an ostensible purpose and without probable cause when, in reality, an intrusion upon private property may be

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Both the Michigan Court of Appeals and the circuit court erred in finding that the upper portion of defendant's driveway was not "generally accessible to motor vehicles" as a matter of law. The circuit court mistakenly agreed with defendant that the location where he had been operating his vehicle was not "generally accessible to motor vehicles" because he was operating the vehicle in his "backyard/sideyard." Defendant's argument is misleading. Defendant was not in his "backyard/sideyard," but on his paved driveway connecting his detached garage to the street. It is clear from the testimony at the preliminary examination and at the evidentiary hearing that defendant pulled his vehicle out of his garage by approximately 25 feet, onto his paved driveway, approximately 50 feet from the roadway. (PE I, 9, 25; ET, 17-18). Officer DeLano

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> actuated by some motive not related to the purpose of the statute or as an additional subterfuge for circumventing the constitutional provision against the search of property without a valid warrant. Personal rights of freedom of movement (privacy) will not be lightly regarded. There continues to be a balancing of private rights against public interest and welfare. There is a heightened, as well as a logical, appreciation of the demands of public and personal safety to which an individual's personal liberties must yield when such yielding is not an inalienable right. We simply restate that the enjoyment of many personal rights and freedoms is subject to many kinds of restraints under the police power of the state, which includes reasonable conditions as may be determined by governmental authority to be essential to public welfare, safety, and good order of the people. [*Id.* at 815-816, citations omitted].

See also *Dunbar,* ___Mich___, sl op, p 7, n 7 (this Court's interpretation of MCL 257.225(2) accords with reasonable view of Legislature's police power); *Mann v St. Clair County Road Commission*, 254 Mich App 86, 104; 657 NW2d 517 (2002), n 14, rev'd on other ground 470 Mich 347 (2004), citing Const 1963, art 4, § 51 (the Legislature shall pass suitable laws for the protection and promotion of the public health); *People v Canty,* 32 Cal 4th 1266, 1279; 90 P3d 1168; 14 Cal Rptr 3d 1 (2004)(purpose of driving under the influence statutes is to protect public and guard against threats to others); *People v Malvitz,* 11 Cal App 4th Supp 9, 14; 14 Cal Rptr 2d 698 (1992)(person driving under influence is always a threat); *Connecticut v Piette*, 16 Conn Supp 357, 360 (1949)(prohibiting driving when intoxicated anywhere within the state is a reasonable and legitimate exercise of police power). Prohibiting the operation of a motor vehicle while intoxicated, anywhere that is generally accessible to motor vehicles, is a reasonable restraint under the police power of the state for the protection of public health.

testified at the evidentiary hearing that defendant stopped the car [after he shined his flashlight at him] between where the fence line began and where the front of his house began. (ET, 32).[27] Contrary to defendant's argument, he was not parked in his "backyard/sideyard," but in his paved driveway next to his house.

The prosecution is not required to show that the public had access to the upper portion of defendant's driveway. Instead, the prosecution is merely required to show that the upper portion of defendant's driveway is "generally accessible to motor vehicles." Because there was no barriers prohibiting persons from entering or exiting defendant's driveway, and there were no "no trespassing" signs on his property, defendant's driveway, even the upper portion of the driveway, was "usually, ordinarily, or for the most part" "able to be used, entered or reached" by motor vehicles. Any other ruling is contrary to the plain language of the statute.

Because defendant was driving his vehicle on his unsecured private driveway which connects his detached residential garage to the public roadway, his conduct fell within the scope of MCL 257.625(1), prohibiting the operation of a vehicle in an area "generally accessible to motor vehicles." Therefore, the trial court erred as a matter of law in dismissing the charged crime, and the Michigan Court of Appeals was clearly erroneous in affirming that dismissal.

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[27] Copies of photographs of defendant's house, which were attached to defendant's circuit court pleadings, are included in Appendix E. The photographs do not depict the actual location of defendant's vehicle on the night in question—defendant's vehicle was further down the driveway [closer to the sidewalk] than the vehicles appear in the photographs. (PE I, 28).

There was a fence on the right side of defendant's property, on the far side of defendant's driveway near his neighbor's house; the fence began parallel and relatively close to the front of defendant's house. (Appendix E). Officer DeLano testified that when defendant's car stopped, the back bumper of the car was "pretty close to the front of the house." (ET, 18). DeLano said that it appeared from the photographs admitted by defendant that the fence line did not extend to where the house started. (ET, 28-29). DeLano testified that defendant's vehicle pulled out and

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RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Marilyn J. Day, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court peremptorily reverse the opinion of the Michigan Court of Appeals, vacate the Oakland County Circuit Court order of dismissal, and remand to the circuit court for further proceedings. In the alternative, the People ask this Court to grant this Application for Leave to Appeal.

Respectfully Submitted,

JESSICA R. COOPER
OAKLAND COUNTY
PROSECUTING ATTORNEY

THOMAS R. GRDEN,
CHIEF, APPELLATE DIVISION

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DATED: June 8, 2016

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stopped somewhere between where the fence line began and where the front of the house began. (ET, 32).